NO. 87-5546

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Application For Stay of Execution
And Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S OPPOSITION TO REQUEST FOR STAY OF EXECUTION AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant
Attorney General for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

* Counsel of Record

QUESTIONS PRESENTED

I. WHETHER THE SINGLE, ISOLATED COMMENT BY A STATE'S WITNESS ABOUT FRANKLIN'S POST-ARREST SILENCE CONSTITUTED A VIOLATION OF DOYLE V. OHIO AND, IF SO, WHETHER THE VIOLATION WAS HARMLESS BEYOND A REASONABLE DOUBT?

II. WHETHER THE COURTS BELOW CORRECTLY IMPOSED THE BAR OF STONE V. POWELL TO FRANKLIN'S CLAIM THAT EVIDENCE INTRODUCED AT HIS TRIAL WAS SEIZED DURING AN ILLEGAL SEARCH?

III. WHETHER THE CONSTITUTION REQUIRES THAT A CAPITAL MURDER JURY BE SPECIFICALLY INSTRUCTED ON THE BALANCING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES?

IV. WHETHER THE FAILURE OF COUNSEL TO RAISE ALL POSSIBLE GROUNDS OF ERROR ON APPEAL RENDERED HIS ASSISTANCE CONSTITUTIONALLY INEFFECTIVE?

V. WHETHER THE COURTS BELOW CORRECTLY ACCORDED A PRESUMPTION OF CORRECTNESS TO THE TRIAL COURT'S FINDING THAT A VENIRE MEMBER WOULD IMPOSE A GREATER BURDEN ON THE STATE THAN PROOF BEYOND A REASONABLE DOUBT AND THUS WAS EXCLUDABLE FOR CAUSE?

VI. WHETHER THE FIRST SPECIAL ISSUE SUBMITTED TO THE JURY DURING THE PUNISHMENT PHASE OF A TEXAS CAPITAL MURDER TRIAL PROPERLY NARROWS THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH SENTENCE?

VII. WHETHER FRANKLIN'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE TRIAL COURT'S INCLUSION OF THE OFFENSES OF KIDNAPPING AND ROBBERY IN A SINGLE APPLICATION PARAGRAPH OF THE CHARGE TO THE JURY.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent[1] herein, by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported below as Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987). A copy of the opinion is attached to the petition for writ of certiorari as Appendix A. The opinions of the United States District Court for the Western District of Texas, San Antonio Division, are not reported. Franklin v. McCotter, No. SA-86-CA-608 (W.D. Tex. July 9, 1986) is attached to the petition for writ of certiorari as Appendix B. Franklin does not challenge the disposition of Franklin v. McCotter, No. SA-86-CA-1286 (W.D. Tex. October 15, 1986), and it is not relevant to these proceedings.

[1]For clarity, Respondent is referred to as "the state," and Petitioner as "Franklin."

JURISDICTION

Franklin does not cite the basis for invoking the Court's jurisdiction. It is presumed that he relies on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Franklin bases his claims for relief on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The state has lawful and valid custody of Franklin pursuant to a judgment and sentence of the 197th Judicial District Court of Cameron County, Texas. Franklin was indicted in Cause No. 82-CR-159-C, styled The State of Texas v. Donald Gene Franklin by the Bexar County Grand Jury for the capital offense of murder of Mary Margaret Moran, committed in the course of committing or attempting to commit robbery or kidnapping, to which he entered a plea of not guilty. The trial was moved on a change of venue to Cameron County, where Franklin was tried by a jury and found guilty of capital murder. After hearing evidence relating to punishment, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981). Accordingly, on March 20, 1982, Franklin was sentenced to death by lethal injection. Venue and jurisdiction then were transferred to the 289th District Court of Bexar County, Texas.

Franklin had been convicted of the same offense twice before and sentenced to death after each conviction. The first

conviction was reversed by the Court of Criminal Appeals. Franklin v. State, 606 S.W.2d 818 (Tex. Crim. App. 1979). The trial court granted Franklin a new trial after his second conviction when it determined that the jury charge was defective. State of Texas v. Donald Gene Franklin, Cause No. 310706.

The Texas Court of Criminal Appeals affirmed Franklin's third conviction and sentence on June 26, 1985. Franklin v. State, 693 S.W.2d 420 (Tex. Crim. App. 1985). A petition for writ of certiorari was denied on February 24, 1986. Franklin v. Texas, ___ U.S. ___, 106 S.Ct. 1238 (1986). On March 13, 1986, the trial court scheduled Franklin's execution to be carried out before sunrise on April 16, 1986. Franklin filed a motion to withdraw the warrant of execution and an application for writ of habeas corpus in the trial court on April 3, 1986. The motion to withdraw the warrant of execution was denied on April 4, 1986, and the court recommended that the application for writ of habeas corpus be denied. The Court of Criminal Appeals denied a stay of execution and denied habeas corpus relief on April 8, 1986. Ex parte Franklin, Application No. 15,849-01.

On April 9, 1986, Franklin filed an application for stay of execution and a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, San Antonio Division. Franklin v. McCotter, No. SA-86-CA-608. The case was referred to a magistrate who conducted an evidentiary hearing on April 30 and May 1, 1986. The magistrate filed a memorandum and recommendation recommending relief be denied. The district court issued a memorandum opinion on July 9, 1986, adopted the magistrate's findings and dismissed the petition. On July 15, 1986, the district court denied a certificate of probable cause to appeal.

While Franklin's application for certificate of probable cause to appeal was pending before the Fifth Circuit, he filed a second federal application for writ of habeas corpus in the district court. Franklin v. McCotter, Civil Action No. SA-86-CA-1286 (W.D. Tex., filed September 12, 1986). The state

responded with a motion to dismiss for abuse of the writ on September 15, 1986. The district court required Franklin to respond to the state's allegation of abuse of the writ and, after considering the justification offered, ordered the second petition dismissed pursuant to Rule 9(b), 28 U.S.C. fol. § 2254. The Fifth Circuit granted a certificate of probable cause and ordered the case consolidated with No. 86-2538, Franklin's original appeal from the denial of his first application for writ of habeas corpus. On July 30, 1987, the court affirmed the opinions of the lower court. Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987).

STATEMENT OF FACTS

Franklin does not challenge the sufficiency of the evidence and the facts are not in dispute. Thus, a recitation of the facts is not necessary. The first opinion of the Court of Criminal Appeals comprehensively set out the facts. Franklin v. State, 606 S.W.2d 818, 819-21 (Tex. Crim. App. 1979).

SUMMARY OF THE ARGUMENT

This case presents no important issue worthy of this Court's certiorari jurisdiction.

The single, isolated comment made by a detective witness that Franklin had refused to talk to him after being read his Miranda warnings, if error, was harmless beyond a reasonable doubt. Franklin's objection to the response was sustained and the jury was instructed to disregard it. The one comment was the only reference to Franklin's silence in an 800-page record. There was no use of the fact that Franklin invoked his right to silence and, thus, no violation. Even if the remark was error, it was harmless beyond a reasonable doubt. The state's case against Franklin was overwhelming. His only defense was that the victim's death was due to the doctor insisting that she be taken to a hospital that was not the best-equipped to handle her condition. The comment did not undermine the plausibility of his defense. Moreover, the jury knew from admissible evidence that

the victim was not found for nearly five days after Franklin's arrest. It was obvious to the jury that Franklin had not talked with police during the interim. The detective's statement did not contribute to the verdict or sentence in this case.

Stone v. Powell holds that where a state provides an opportunity for litigation of a claimed fourth amendment violation, federal habeas corpus relief is not available on the ground that evidence from an illegal search or seizure was used at trial. Case law applying Stone v. Powell makes clear that it is the opportunity to litigate the claim, not whether a defendant actually utilizes state-created procedures, that is dispositive. Texas courts afforded Franklin an opportunity to litigate the merits of his motion to suppress evidence and he had, in fact, had a hearing in the trial court. Franklin's fourth amendment claim was properly held to be barred.

Although the Constitution requires that the defendant in a capital case be permitted to present evidence in mitigation of punishment, there is no constitutional requirement that the jury be instructed on balancing mitigating and aggravating factors.

Appellate counsel need not raise every non-frivolous ground on appeal but must search the record and exercise his professional judgment as to which issues offer the best chance for success. Franklin's appellate attorney thoroughly examined the record for errors and researched the applicable law. He reasonably concluded that there was little chance of success in arguing that instructions on mitigation should have been given or that the motion to suppress had been erroneously denied. He properly limited his efforts to those issues that, in his opinion, were more likely to secure a reversal.

The courts below correctly accorded a presumption of correctness to the trial court's finding that venire member Santana was disqualified from serving on the jury because she would have held the state to a burden of proof greater than beyond a reasonable doubt. The record fully supports the finding

that the state's challenge to Ms. Santana for cause was correctly sustained.

A death sentence in Texas is predicated upon the jury's affirmative finding that the defendant acted deliberately in committing the capital murder and a finding of future dangerousness. A finding that the defendant acted deliberately is different from the finding during the guilt-innocence stage that he acted intentionally. The Texas capital sentencing statute limits the offenses for which capital punishment can be imposed, requires the jury to find a probability that the defendant will commit future acts of violence, allows the introduction of any evidence in mitigation of punishment and mandates an automatic appeal, thus insuring that the death penalty will not be imposed "wantonly" or "freakishly."

The trial court instructed the jury that it could find Franklin guilty of capital murder if it found that he committed murder while in the course of committing kidnapping or robbery. The evidence introduced at trial was sufficient to prove that Franklin had kidnapped and robbed the victim and, in the process, inflicted the wounds that resulted in her death. Under the uncontradicted evidence, a rational trier of fact could only find that Franklin was guilty under both theories of the offense. The court's instruction did not violate due process.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Franklin has advanced no special or important reason in this case, and none exists.

II.

THE SINGLE COMMENT BY A WITNESS ABOUT FRANKLIN'S POST-ARREST SILENCE DID NOT VIOLATE HIS RIGHT TO SILENCE; ALTERNATIVELY, ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

During the state's direct examination of Detective Urban, the prosecutor established that Franklin was given his warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) (SF IX 2273-74). He then asked whether the witness had had a conversation with Franklin, to which Detective Urban answered "I talked to him but he refused to talk to me." (SF IX 2279).

It is well settled that a prosecutor may not use the defendant's post-arrest silence for substantive value or impeachment purposes. Doyle v. Ohio, 426 U.S. 610 (1976). The rationale for this rule is "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." South Dakota v. Neville, 459 U.S. 553, 565 (1983). The court below relied on this Court's decision last term in Greer v. Miller, ___ U.S. ___, 107 S.Ct. 3102 (1987), in finding that no violation occurred in this case.

The prosecutor in Miller began his cross-examination of the defendant by asking why he had not told the exculpatory story he had just related at the time of his arrest. An immediate objection was sustained, the jury was instructed to disregard the question, and the court gave a general instruction in its charge that the jury was not to consider any question to which an objection had been sustained. This Court held that the protection afforded by Doyle was not abridged because the prosecutor was not allowed to undertake impeachment of the defendant's account or permitted to call attention to his silence. "The fact of Miller's postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no Doyle violation occurred in this case." Greer v. Miller, ___ U.S. at ___, 107 S.Ct. at 3108.

As the court of appeals recognized, Miller is virtually identical to the instant case. Franklin v. Lynaugh, 823 F.2d at 99. Here, Franklin objected as soon as the comment was made, his objection was sustained, and the jury was instructed to disregard. No further mention was made during the trial of the fact that Franklin invoked his right to silence. Even more compelling in this case is that the remark was not used to impeach Franklin's defense. At trial, Franklin attempted to show that the victim's death was caused by her doctor's insistence that she be taken to a hospital that was not the best equipped to treat her. The comment on his silence did not undermine the plausibility of this defense. Accordingly, the court below was correct in finding no Doyle violation.

Even if the comment amounted to a constitutional violation, the error was harmless beyond a reasonable doubt. See Wainwright v. Greenfield, 474 U.S. 284, 290 n.13 (1986). A constitutional violation is harmless if the state demonstrates that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. Chapman v. California, 386 U.S. 18, 23 (1967). A review of the record here shows that any error was harmless beyond a reasonable doubt.

First, the evidence of Franklin's guilt was overwhelming. Franklin was identified by two eyewitnesses as having been in the hospital parking lot immediately prior to the victim's abduction. One of the witnesses, a security officer, found the victim's car out of its parking space and abandoned. He tried to stop Franklin's car, which sped away from the vicinity, drove through a barricade, and jumped a curb. The guard noted the car's license number. Police traced the vehicle to Franklin and obtained his consent to search it and his house. The search produced a pair of Franklin's pants soaking in rose-colored water, a muscle shirt, and a pair of shoes belonging to Franklin. All contained human blood stains, some of which matched the deceased's blood type. Plant material from the trouser cuffs matched samples from the area where the victim was found, and

fibers on the shirt matched those from the victim's sweater. A search of the trash can near Franklin's back door turned up the victim's purse, billfold, credit cards, driver's license, checkbook, and nurse's scissors. Some of the items were partially burned. Franklin's car yielded a small rope with human blood stains, and blood of the victim's type on the rear seat and carpet. Hairs matching the victim's were recovered from the car, and soil samples found under the car's fenders were the same as that in the area where the victim was found. The evidence of Franklin's guilt, though circumstantial, was overwhelming.

In addition, the remark concerning Franklin's silence occurred only once. No further reference was made to it by witnesses or the prosecutor. Franklin's objection was sustained and curative instructions were given to the jury. The remark occurred in the course of a trial that produced some 800 pages of testimony. It was not brought up during final arguments. Clearly, the remark could not have been a factor in the jury's determination that Franklin was guilty.

Finally, the comment was not used to impeach an exculpatory defense that Franklin offered at trial. As noted above, Franklin did not testify and his only defense was that the victim's death was the result of wrong decisions by her doctor. The comment that he had not talked to the police after his arrest did not undermine this contention.

Franklin argues that in the context of the particularly horrible facts of this case, the statement that he did not speak to the police officer did in fact influence the jury's verdict. The victim was left for dead in an open field, endured exposure for five days in the July sun, slowly bled to death from seven stab wounds, and was infested with insects. Franklin argues that the state purposely elicited the comment to underscore the fact that he could have prevented the tragedy by telling authorities where the body was. However, admissible evidence made the jury aware of the circumstances surrounding the death, the fact that Franklin had been arrested hours after the abduction, and the

fact that the victim's body was not discovered until several days later. Franklin is not so bold as to suggest that the jury believed that he had informed the police of the whereabouts of the body but that, because of official indifference, it was not found for five days. Detective Urban's comment did not reveal to the jury anything that it did not know from properly admitted evidence. The objected-to comment, in the circumstances of this case, was harmless beyond a reasonable doubt.

III.

FEDERAL HABEAS CORPUS IS NOT AVAILABLE TO REVIEW FRANKLIN'S CLAIM THAT EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AMENDMENT WAS IMPROPERLY ADMITTED AT TRIAL.

Franklin concends that the trial court erred in denying his motion to suppress iliegally seized evidence. However, as the courts below determined, Franklin is barred from raising this claim on collateral attack.

In Stone v. Powell, 428 U.S. 465 (1976), this Court held that when a state provides the opportunity for full, fair litigation of a Fourth Amendment issue, review of such a claim is precluded in federal habeas corpus. Franklin had a full pretrial hearing on his motion to suppress evidence (SF I 80-285). He was afforded an opportunity to define the parameters of the hearing (SF I 80-81). All of the testimony from the hearing prior to the first trial on a similar motion was introduced (SF I 73-77), and Franklin presented additional evidence (SF I 83-141, 253-75). After submitting all of the evidence he deemed necessary, Franklin closed (SF I 278). He was given a full opportunity to argue the merits of the motion (SF I 281-84). At the federal evidentiary hearing, Franklin's trial attorney acknowledged that the hearing had been full and fair (FEH I 28). Because the state afforded Franklin a full and fair hearing on his Fourth Amendment claim, review is not available in these proceedings. Stone v. Powell, 428 U.S. at 495; Wicker v. McCotter, 783 F.2d 487, 497 (5th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 3310 (1986).

Franklin asserts that Stone should not apply in this case because the search and seizure issue was not raised by his attorney on appeal and, thus, was not addressed by the Texas Court of Criminal Appeals. This is irrelevant to the appropriate analysis. Stone noted that the principles underlying the exclusionary rule are not furthered by allowing Fourth Amendment claims to be raised on collateral attack. 428 U.S. at 493. If a defendant could avoid the preclusive effect of Stone merely by not utilizing the state-created mechanisms for testing the validity of a search, there would be no incentive for presenting the claims to the state courts in the first instance. Joshua v. Maggio, 674 F.2d 376, 377 (5th Cir.), cert. denied, 459 U.S. 992 (1982); see also Gibson v. Jackson, 578 F.2d 1045, 1053 (5th Cir. 1978) (addendum by Rubin, J.) ("Stone dictates that, if there is a deliberate by-pass or waiver of Fourth Amendment contentions, no federal hearing is warranted even if no state hearing whatsoever was held.").

Finally, contrary to Franklin's assertion in his petition, the courts below did review the merits of his Fourth Amendment claim, albeit under the allegation that appellate counsel was ineffective for failing to raise the claim as a ground of error. See Franklin v. Lynaugh, No. CA-86-SA-608, slip op. at 8-11. This analysis, consistent with this Court's opinion in Kimmelmann v. Morrison, ___ U.S. ___, 106 S.Ct. 2574 (1986), properly concluded that there was no merit in Franklin's contention that the evidence against him was seized in an unconstitutional search. See Part V, infra.

IV.

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT A CAPITAL MURDER JURY BE SPECIFICALLY INSTRUCTED ON BALANCING AGGRAVATING AND MITIGATING CIRCUMSTANCES AND THE COURT DID NOT ERR IN REFUSING FRANKLIN'S REQUESTED INSTRUCTIONS.

Franklin asserts that it was error for the trial court to deny his "Special Requested Charges on Punishment No. 1-5": All

of the requested instructions dealt with how the jury should consider mitigating evidence. Franklin premises his argument on the contention that the jury must be given guidance on how to deal with evidence offered in mitigation of punishment.

It is beyond dispute that a jury considering the death penalty may not constitutionally be precluded from considering whatever evidence the defendant has in mitigation of punishment. Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716 (1987); Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987); McClesky v. Kemp, ___ U.S. ___, 107 S.Ct. 1756 (1987); Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). This Court has made it clear that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required. The Court approved the Texas system of "narrowing the categories of murder for which a death sentence may ever be imposed." Jurek v. Texas, 428 U.S. 262, 270 (1976). It also held that one of the questions posed at the punishment stage of trial allowed the defendant to bring all relevant mitigating circumstances to the jury's attention. Id., at 273-74. Thus, the Court upheld a system of imposing capital punishment in which aggravating and mitigating circumstances are not considered at the same stage of the proceedings and not explicitly balanced against each other. Subsequent cases analyzing the individualized capital-sentencing doctrine have cited with approval the Texas statute as one permitting jury consideration of the relevant mitigating circumstances despite the lack of statutory reference to jury consideration of mitigating factors. Sumner v. Shuman, ___ U.S. at ___, 107 S.Ct. at 2720; Pulley v. Harris, 465 U.S. 37, 48-50 and n.9, 10 (1983); Barefoot v. Estelle, 463 U.S. 880, 897 (1983); Lockett v. Ohio, 438 U.S. at 606-07. The Court more recently has expressly held that:

> the Constitution does not require a State to adopt specific standards for instructing the

> jury in its consideration of aggravating and mitigating circumstances . . .

Zant v. Stevens, 462 U.S. 862, 890 (1983).

Franklin's claim that the trial court was required to give his instructions on mitigating evidence is contrary to this Court's prior decisions and is not worthy of further review.

V.

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ALL POSSIBLE CLAIMS ON APPEAL.

Franklin next asserts that his appellate attorney, the Honorable David K. Chapman, rendered ineffective assistance because he did not argue on appeal that the trial court erred in denying his motion to suppress evidence and his requested jury instructions on mitigation of punishment. Franklin argues that either of these claims, if properly presented to the Court of Criminal Appeals, would have resulted in a reversal of his conviction. By failing to have those grounds reviewed by the appellate court, Franklin contends, counsel rendered ineffective assistance.

A convicted defendant pursuing a first appeal as a right is entitled to those safeguards necessary to make the appeal adequate and effective, including the effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387 (1985). However, the constitution does not require counsel to raise every non-frivolous ground that might be pressed on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Appellate counsel's task is to present the client's case in as strong a posture as possible. This Court in Jones recognized that this often means selecting one or a few issues from among several possible grounds of error. The exigencies of modern appellate practice, with page limits on briefs and time limits on oral argument, dictate that counsel carefully scan the record and chose those arguments that, in his judgment, offer the greatest chance of success. Id., at 752-53. The selection process may require counsel to omit some arguable

issues in favor of others that are more likely to result in a reversal. Id.

Franklin concedes that appellate counsel's effectiveness is measured by the same standard as trial counsel's: whether his performance was deficient when judged by an objective standard and whether the appeal was prejudiced thereby. Strickland v. Washington, 466 U.S. 668 (1984). Prejudice results if there is a reasonable probability that, but for counsel's omitting a particular ground of error, the case would have been reversed.

Chapman testified at the evidentiary hearing that he had researched the record of Franklin's trial before writing the appellate brief (FEH II 8, 34-40). He rejected as a ground of error that the trial court improperly refused to give instructions on how to evaluate mitigating evidence because the issue had been addressed by the Court of Criminal Appeals before and decided against him (FEH II 10). He also considered the search and seizure issue but determined that, given the trial court's credibility choicer, the motion to suppress had been decided correctly (FEH II 11-12). He recognized that there was little hope of having the appellate court reject the trial court's credibility choices (FEH II 12). Chapman concluded both of these grounds were frivolous and that, if he had raised them in his brief, he would have weakened his credibility with the court (FEH II 10, 33).

It is clear that Chapman's judgment was correct. The Court of Criminal Appeals had consistently rejected the notion that the trial court must instruct the jury on how to evaluate mitigating evidence, see Quinones v. State, 592 S.W.2d 933, 947 (Tex. Crim. App.), cert. denied, 449 U.S. 839 (1980), and that court's rule is in accordance with Zant. Franklin has never suggested a new argument that might have been urged to persuade the Court of Criminal Appeals or this Court to overrule its past decisions. With respect to the motion to suppress, counsel also was reasonable in deciding not to raise the issue. The motion hinged on whether Franklin's consent was voluntary. Whether a person's

consent to search was voluntary is a question of fact to be determined from the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); Meeks v. State, 692 S.W.2d 504, 510 (Tex.Crim.App. 1985); Doescher v. State, 578 S.W.2d 385, 389 (Tex.Crim.App. 1978). Here, the trial court held an extensive hearing on Franklin's motion to suppress (SF I 80-285). There was conflicting testimony as to whether the police handled Franklin roughly, threatened him, or had their weapons drawn. The trial court clearly made credibility choices among the witnesses in making factual findings. Because the trier of fact is the sole judge of the credibility of the witnesses, Bellah v. State, 653 S.W.2d 795, 796 (Tex.Crim.App. 1983); Corley v. State, 582 S.W.2d 815, 819 (Tex.Crim.App.), cert. denied, 444 U.S. 919 (1979), counsel reasonably concluded that it would be unavailing to contend that the court erred in denying the motion to suppress, and the decision not to raise such a claim was clearly within the wide range of reasonably professional judgment. Cf. Wicker v. McCotter, 783 F.2d at 497 (raising only those issues counsel thought meritorious "represented the kind of strategy that able counsel pursue and appellate courts appreciate.) The courts below correctly applied the proper constitutional standard in rejecting Franklin's claim.[2]

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[2]Franklin also asserts that his consent followed an illegal arrest, which would have vitiated its voluntariness. Meeks v. State, 692 S.W.2d at 510. He contends that counsel should have made this argument on appeal. The record of the hearing on the motion to suppress reflects that this argument was not made to the trial court. Nor was the issue contained in the brief in support of the motion. Failure to raise such an objection in the trial court waives the claimed error for appellate review. Writt v. State, 541 S.W.2d 424, 426-27 (Tex. Crim. App. 1976). Counsel acted reasonably in not raising an issue that had not been preserved for appellate review.

VI

THE TRIAL COURT CORRECTLY EXCUSED VENIREPERSON SANTANA FOR CAUSE AND ITS DETERMINATION IS ENTITLED TO A PRESUMPTION OF CORRECTNESS BY THIS COURT.

Franklin contends that the trial court committed error when it granted the state's challenge for cause to venireperson Flavia Santana. During voir dire, the state challenged Ms. Santana because that she would hold the state to a stricter burden of proof than that imposed by law. On further questioning by defense counsel, Ms. Santana was rehabilitated and the court denied the state's challenge (SF IV 1191). The state then attempted to clarify Ms. Santana's position and the following exchange took place:

Questions by Mr. Harris (the prosecutor):

"Q. You seem to give me one answer and you give Mr. Cazier another answer. You are either going to follow the reasonable doubt or you are not?

"A. Okay. I want more than a reasonable doubt. Okay.

"Q. You want proof beyond any doubt whatsoever?

"A. Right.

"MR. HARRIS: We submit that juror is subject to challenge for cause.

"THE COURT: Okay. Mr. Cazier, did you have any final questions?

"MR. CAZIER: Yes.

Questions by Mr. Cazier (defense counsel):

"Q. Mrs. Santana, the problem is that the law in civilized countries knows no higher burden than beyond a reasonable doubt. Okay. An that burden is just about as high as an individual juror wants to make it. Nobody is going to define for you or tell you what is a reasonable doubt, okay. It is your decision to decide what is reasonable and to say whether or not you have doubt. Knowing that, I want to ask you again, if what you are really saying, I guess so simple that in view of the finality of the death penalty, that your construction of the term reasonable doubt would be very very strict, not that you would go beyond the law and require total certainty, but only that you will require a very strict interpretation of reasonable doubt. Would that be so?

"A. Let me ask you something first. Does that mean then that a reasonable doubt is different in each person's mind, like what is reasonable for me could not be for you or vice versa?

"Q. That's right. That's why we have twelve jurors instead of one.

"A. So your question was?

"Q. Isn't what you are really saying that your construction of the term reasonable doubt would be very very strict, not that it would be anything higher than beyond a reasonable doubt?

"A. Well, I will say then that my level or my whatever, for reasonable doubt is very nigh.

"MR. CAZIER: Thank you.

Questions by Mr. Harris:

"Q. Didn't you also say that your reasonable doubt would be different in a capital case than it would say in some other case?

"A. Yes, sir.

"Q. Because of the very nature of it, and didn't you say you would have to be one hundred percent convinced before you can find a person guilty of Capital Murder?

"A. I said that.

"MR. HARRIS: We renew our challenge for cause.

"THE COURT: Mrs. Santana, would you have to be absolutely certain?

"A. Yes.

"THE COURT: All right. Now, the Court is going to instruct the jury in every case, that a defendant's guilt must be proved by legal an competent evidence beyond a reasonable doubt. Would you hold the State to a more severe burden than that? Would you make them prove it to an absolute certainty?

"A. Well, it would -- they would have to prove to me beyond a doubt and up to one hundred percent.

"THE COURT: All right.

"A. In other words, my limit as far as doubt is very high. It is very close to one hundred percent. And I'm sorry if I am not making myself clear.

"THE COURT: You are making yourself clear.

All right. Does the State persist in their challenge for cause on this venireperson?

"MR. HARRIS: Yes.

(SF IV 1192-95).

Ms. Santana stated that because this was a capital punishment case, she would hold the state to the burden of proving its case, "up to one hundred percent," and that she would have to be "absolutely certain" before she could find a defendant guilty. To determine whether she was properly excludable, the trial court must inquire "whether the juror's views would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Wi[illegible], 469 U.S. 412, 424 (1985), quoting, Adams v. Texas, 448 U.S. 38, 45 (1980). The trial court is in a unique position to make this determination, which depends to a large degree on the venireperson's demeanor, credibility, and state of mind. Wainwright v. Witt, 469 U.S. at 428; Patton v. Yount, 467 U.S. 1025 (1984). A finding that a prospective juror could not comply with the prescribed duties is entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Wainwright v. Witt, 469 U.S. at 429. Here, the record clearly supports the court's determination that Ms. Santana could not follow the law with respect to the state's burden of proof. She would have required the state to convince her to an absolute certainty of Franklin's guilt. This is not, as Franklin contends, merely setting the standard of reasonable doubt at a high level. Instead, it changes the very nature of the burden the State would have to bear in order to obtain a conviction. The trial court granted the state's challenge for cause under the proper constitutional standards and the lower federal courts correctly accorded its finding a presumption of correctness. 28 U.S.C. § 2254(d); Wainwright v. Witt, 469 U.S. at 429. Franklin presents no claim meriting this Court's review.

VII.

THE TEXAS CAPITAL SENTENCING STATUTE ACTS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH SENTENCE AS REQUIRED BY THE CONSTITUTION.

Franklin attacks the constitutionality of the Texas capital punishment statute on the ground that it fails to properly narrow the class of persons eligible for the death sentence. In Texas, once a defendant has been found guilty of capital murder, the jury must answer special issues to determine punishment. First, the jury must decide whether the defendant acted deliberately and with the reasonable expectation that the death of the deceased or another would result. Second, the jury must determine whether there is a probability that the defendant would commit criminal acts of violence in the future that would constitute a continuing threat to society. Tex. Code Crim. Proc. Ann. art. 37.071(b)(1), (2) (Vernon Supp. 1981). If the jury answers both questions "Yes," the court must impose a death sentence. If the jury answers either question "No," or fails to answer either question, the court must sentence the defendant to life imprisonment. Id., art. 37.071(e).

Franklin acknowledges that this scheme for imposing capital punishment has been upheld by this Court. Jurek v. Texas, 428 U.S. 262 (1976). However, he contends that the Court was addressing only the second question posed to the jury. In Franklin's view, the constitutional defect is in the first special issue. Franklin notes that at the guilt-innocence stage of the trial, the jury must find that the defendant committed murder intentionally. Tex. Penal Code Ann. § 19.03(a) (Vernon 1974). Equating "intentionally" with "deliberately," used in the first special issue, Franklin asserts that article 37.071(b)(1) is meaningless. He elevates this to the level of a constitutional flaw by claiming that the statute does not narrow the sentencer's discretion to prevent the arbitrary imposition of the death penalty in violation of Furman v. Georgia, 408 U.S. 238 (1972).

Franklin's argument ignores the fact that the Texas Court of Criminal Appeals has expressly held that "deliberately" and "intentionally" are not linguistic equivalents. Heckert v. State, 612 S.W.2d 549, 552 (Tex.Crim.App. 1981). After deciding that the defendant acted intentionally, the jury must further determine whether that act was the result of a "thought process which embraces more than a will to engage in conduct and activates the intentional conduct." Fearance v. State, 620 S.W.2d 577, 584 (Tex.Crim.App. 1981) (footnote omitted).

It has already been held that the Texas statute defining capital murder sufficiently narrows the class of persons subject to the death penalty by requiring the finding of at least one aggravating circumstance. Barefoot v. Estelle, 463 U.S. 880 (1983); Jurek v. Texas, 428 U.S. at 268. The first special issue required by the sentencing statute further restricts the class by limiting the death penalty to only those capital murderers who acted deliberately. Heckert v. State, 612 S.W.2d at 552. Contrary to Franklin's assertions, article 37.071(b)(1) is not a nullity and does not render the statute unconstitutional.

Moreover, the constitutionality of the death penalty statute must be determined by looking at the entire scheme. Assuming, arguendo, that the first special issue of article 37.071 is a nullity, that does not invalidate the remainder of the law's provisions. As noted in part IV, supra at, a capital punishment statute must insure that the death penalty is not "wantonly" or "freakishly" imposed. Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring). This Court has already held that the Texas scheme passes this test by requiring the jury to must find at least one aggravating circumstance before finding a defendant guilty of capital murder. Tex. Penal Code Ann. § 19.03; Jurek v. Texas, 428 U.S. at 270-71. The special issues further narrow the instances in which a defendant can be sentenced to death. The jury must find that he will continue to commit violent acts in the future and be a continuing threat to society. In appropriate cases, the jury must also find that the

defendant's action was an inappropriate response to provocation by the victim. Tex. Penal Code Ann. 37.071(b)(2), (3). Finally, the Court of Criminal Appeals automatically reviews the conviction in every capital punishment case. As Jurek has already held, this scheme assures that the death penalty is not imposed in an unconstitutional manner. Even if the first special issue submitted to the jury does little to contribute to narrowing the class of defendants who can receive the death sentence, the entire statutory scheme is clearly constitutional. The lower courts' rejection of Franklin's claim was proper and further review by this Court is not warranted.

Nor is the granting of certiorari in Lowenfield v. Phelps, 817 F.2d 285 (5th Cir.), cert. granted, ___ U.S. ___, 107 S.Ct. 3227 (1987), significant in this case. One of the issues raised in Lowenfield is whether it is constitutionally permissible to impose the death penalty when the only aggravating factor duplicates a finding made at the guilt-innocence phase of trial. 817 F.2d at 288. Even if the Court determines that Lowenfield's death sentence was improper, it would not affect the sentence in this, or any other, death penalty case from Texas. This precise claim was recently rejected by the Fifth Circuit. In Thompson v. Lynaugh, 821 F.2d 1054, 1059-60 (5th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. ___ (1987), the court noted that becasue the second special issue, which does not duplicate any element of the offense of capital murder, performs a narrowing function, the existence of such an alternative narrowing issue renders the question of whether the first special issue duplicates an element of capital murder constitutionally irrelevant. As in Thompson, Franklin fails to demonstrate that the second special punishment issue by itself fails to adequately narrow the class of persons eligible for a death sentence or that the first special issue precludes the admission of evidence in mitigation of punishment. His assertion that "once the jury found petitioner guilty of capital murder it had no legal discretion except to sentence him to death" (Pet. at 31), simply and blatantly misstates the law.

VIII.

THE TRIAL COURT'S INSTRUCTIONS, WHICH COMBINED THE OFFENSES OF KIDNAPPING AND ROBBERY IN A SINGLE APPLICATION PARAGRAPH, DID NOT DEPRIVE FRANKLIN OF DUE PROCESS.

Franklin asserts that the trial court's charge to the jury was flawed by authorizing, in a single paragraph, a conviction if the jury found that Franklin committed murder in the course of committing and attempting to commit the offense of kidnapping or robbery. Such a charge, Franklin contends, allowed him to be convicted by less than a unanimous jury, because some jurors could have believed he committed murder in the course of committing kidnapping, while other jurors could have believed the underlying felony was robbery. Franklin notes that the verdict form stated only that Franklin was guilty of capital murder.

Review in federal habeas corpus of allegedly defective jury instructions is limited to whether the asserted impropriety "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141 (1973).

The court below correctly found that the charge, even if erroneous, did not rise to the level of violating Franklin's rights. As the Fifth Circuit noted:

> The evidence supporting the commission of both felonies war crushing, unanswerable; the only question was, who did them? In these circumstances, the claim that some jurors may have thought Franklin only a kidnapper while others thought him only a robber lacks any substance whatever, despite its abstract plausibility. The jury faced only one real question: whoever did this thing did both robbery and kidnapping, but was it Franklin?

Franklin v. Lynaugh, 823 F.2d at 99.

Franklin's attempt to show a conflict between the lower court's opinion and Johnson v. Connecticut, 460 U.S. 73 (1983), is unavailing. Johnson involved a jury instruction that created a presumption of intent, an element of the offense, in violation of Sandstrom v. Montana, 442 U.S. 510 (1979). The charge here contained no such defect. Moreover, in Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101 (1986), this Court held that Sandstrom error is subject to harmless error analysis. To the extent that there

is conflict between this case and Johnson, the court below's opinion demonstrates that any error in the charge was harmless. Thus, Franklin's claim warrants no further review.

CONCLUSION

For the above reasons, the state prays that the application for stay of execution and petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney
General for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT